

NAELA JOURNAL

National Academy of Elder Law Attorneys • Special Edition • 2018

Representing Fiduciaries: Guidance From NAELA's Aspirational Standards
By Renée C. Lovelace, CELA

Copyright © 2018 by the National Academy of Elder Law Attorneys, Inc. Any use of the contents of this publication without the express written permission of the publisher is strictly prohibited.

NAELA Journal (ISSN 1553-1686) is published annually by the National Academy of Elder Law Attorneys, Inc., 1577 Spring Hill Road, Suite 310, Vienna, VA 22182, and distributed to members of the Academy and to law libraries throughout the country. Two e-Issues are published — one in Spring and one in Fall.

NAELA's mission is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law.

Elder and special needs law topics range over many areas and include: preservation of assets, Medicaid, Medicare, Social Security, disability, health insurance, tax planning, conservatorships, guardianships, living trusts and wills, estate planning, probate and administration of estates, trusts, long-term care placement, housing and nursing home issues, elder abuse, fraud recovery, age discrimination, retirement, health law, and mental health law.

Articles appearing in *NAELA Journal* may not be regarded as legal advice. The nature of elder and special needs law practice makes it imperative that local law and practice be consulted before advising clients. Statements of fact and opinion are the responsibility of the author and do not imply an opinion or endorsement on the part of the officers or directors of NAELA unless otherwise specifically stated as such.

A subscription to *NAELA Journal* is available to law libraries for \$70 per year. A combined subscription to *NAELA News*, distributed four times a year, and *NAELA Journal* is available to law libraries for \$135 per year. Back issues of *NAELA Journal* and *NAELA News* are available to NAELA members and subscribing law libraries in electronic format on www.NAELA.org. Address changes or other requests regarding subscription information should be directed to Nancy Sween, Sr. Director of Communications and Publications, nsween@naela.org.

Representing Fiduciaries: Guidance From NAELA's Aspirational Standards

By Renée C. Lovelace, CELA

I. Introduction to the Stage: Fiduciary Representation	120
II. Background: Fiduciary Duties, Liability Risks, and Chaos	121
III. Starting Points — Each State's Unique Position	122
IV. Definitions.....	123
A. Reasonable.....	123
B. Fiduciary	123
C. Protected Individual	124
D. Original Property Owner, Grantor, or Principal.....	124
E. Estate.....	125
V. Holistic Approach — Standard A.....	125
A. Setting the Stage for Client Identification, Diminished Capacity, Increased Dependence on Others, Planning for Changes, Representation Migration, and Other Matters That No One Likes to Think About.....	125
B. Will the Shoes Fit When the Fiduciary Steps Into Them?	127
C. Fiduciary and Principal — Aren't Their Interests Identical?	129
D. Anticipating Vulnerabilities That Could Lead to Abuse, Neglect, and Exploitation of a Protected Individual.....	129
E. Transitions: Smooth Sailing or a Bumpy Ride?.....	130
VI. Standard B — Client Identification	132
A. Fiduciary, Principal, Advocate, Family Group, Beneficiary, or Others: Who Is the Client?.....	132
B. Fiduciary or Protected Individual: Who Is the Client?	134
C. The Attorney's Differing, Slipping, and Sliding Duties.....	135
D. Differences of Interest Between Fiduciaries and Principals	135
E. The Importance of a Private Meeting	136
VII. Standard C — Engagement Agreements and Document Drafting	136
VIII. Conclusion	138

About the Author

Renée C. Lovelace, CELA, is a National Elder Law Foundation Certified Elder Law Attorney (CELA) and has a solo practice based in Austin, Texas. She is a graduate of the University of Texas School of Law, the University of Chicago Booth Graduate School of Business, and Oral Roberts University.

I. Introduction to the Stage: Fiduciary Representation

In most attorney-client representation matters, the party who signs the engagement agreement and pays the attorney's fees will be the client. It may appear — at first glance — that there is little difference between this type of representation and an attorney's representation of fiduciaries.

With nary a moment of comfort, however, the plot thickens, as the saying goes. In the theater version of "The Fiduciary Representation Story," a complex and duty-laden character referred to as a fiduciary enters the stage playing multiple roles while changing hats frequently. Spoken in ominous tones, the lines "breach of fiduciary duty" and "abuse of discretion" whispered or shouted by other characters put audience members on the edge of their seats.

As the story unfolds, the audience realizes it is a mystery. One person is charged with the goal of protecting the property or well-being of another, under circumstances that may be as vast as the population itself. It appears that the goal is ambitious, but one has a foreboding that it is just the proverbial tip of the iceberg. The mystery continues; the audience is puzzled by scenes in which a fiduciary appears to meet all legal duties yet faces accusations of impropriety, which could be costly. As this story continues, an increasing number of scenes cast the fiduciary as a villain.

At some point in the play, several fiduciary litigation attorneys enter the stage and speak their lines: "If you are asked to serve as a fiduciary, decline." "If you are serving as a fiduciary, resign." "Never let anyone you care about serve as a fiduciary." Part of the mystery becomes clear: Fiduciaries are held to high — sometimes unattainable or uneconomical — standards when managing property for the

benefit of others. We see that fiduciary duties can create time-consuming work and liability risks and that costs increase as work and risks increase.¹ Suspense builds as a person with property needs more assistance and others try to assist, balancing costs and benefits, sometimes resulting in fiery disagreements.

As in the field of elder and special needs law, we see that fiduciaries are not just *important* — they are *essential*. If fiduciaries leave the stage, the story ends; if there are no fiduciaries, there can be no implementation of plans. If a plan cannot be implemented, it is not a realistic plan; it is merely a one-person play in which the script consists of a property owner saying, "My property shall be used to do as I say," along with a list of instructions no one must follow.

This article discusses the importance of fiduciary representation — even when protecting fiduciaries is not the primary goal of the field of elder and special needs law. The primary goal is to create, provide, administer, and protect long-term care plans for individuals who are (or may become) vulnerable, using the property available to implement such plans.

1 "The law tends to impose fiduciary obligation in circumstances that present what economists call a *principal-agent* or *agency problem*. An agency problem arises whenever one person, the *principal*, engages another person, the *agent*, to undertake imperfectly observable discretionary actions that affect the welfare of the principal. ... Agency problems are pervasive because no one has the skills necessary to do everything for himself and because every undertaking has an opportunity cost." Robert H. Sitkoff, *An Economic Theory of Fiduciary Law* ch. 9, 198, in *Philosophical Foundations of Fiduciary Law* (Andrew Gold & Paul Miller eds., Oxford U. Press 2014), ssrn.com/abstract=2367006 (accessed Sept. 14, 2018) (emphasis in original).

To meet this goal, effective fiduciaries are necessary. To have effective fiduciaries, prudent and qualified individuals must be willing to serve in fiduciary roles despite the risks. The NAELA Aspirational Standards provide guidance to attorneys who represent fiduciaries.²

If an article on fiduciary representation were a play, the audience would leave unsatisfied; critics would be merciless. At the end, the mystery would not have been solved because there was no Agatha Christie or Perry Mason moment of clarity. When there are problems, the final act may close with the fiduciary — or the fiduciary's attorney — as the prime suspect. It appears that the only way to fully protect a proposed fiduciary is to advise the individual to decline to serve — to stay off the stage no matter how much the fiduciary cares about the original property owner's objectives. If an attorney advises a fiduciary to decline to serve, will the attorney be liable to the intended beneficiaries for the lack of the fiduciary's service?

We leave this introduction with the understanding that the basic principle of administering estates for the benefit of intended beneficiaries is unchanged, ex-

cept that representation of fiduciaries has tipped from the need to advise fiduciary clients on meeting fiduciary duties to the need to advise them on meeting fiduciary duties in a defensive manner and on recognizing the possibility that in some cases or states, an attorney may be treated as having fiduciary duties to parties the attorney has never met.

II. Background: Fiduciary Duties, Liability Risks, and Chaos

In cases handled by elder and special needs law attorneys, fiduciary representation is not a play, it is not fiction, and it does not exist for the entertainment of others. Although cases replete with family dynamics, property, accusations of greed and misdeeds, unmet health and safety needs, and harm to vulnerable individuals make for dramatic reading,³ such cases may represent staggering legal fees, overall failures in planning, and lost opportunities for the health and well-being of those who may suffer greatly from such losses.

An objective of this article is to consider how the NAELA Aspirational Standards apply to duties, risks, and uncertainties associated with planning for one party to be responsible for the property of another. Representation of fiduciaries from the planning stages forward may encourage more prudent individuals to serve in fiduciary roles.

When deciding whether to represent a fiduciary or a proposed fiduciary, the attorney will consider what fiduciary duties apply, who owes the duties, to whom the duties are owed, the costs of meeting the duties, whether costs will be covered, whether documents may be changed or

² See NAELA Aspirational Stand. Preamble (2d. ed., NAELA 2017), which states: "Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, 'Who is the client?' present issues not regularly faced by attorneys in other fields." In this article, there is more emphasis on the problems faced by family, friend, and other individual fiduciaries than on the problems faced by other types of fiduciaries.

³ For examples of such cases, search the internet for "fiduciary" along with the names Brooke Astor, Mollie Orshansky, or Michael Jackson.

Also available as part of the eCourse

[How to Reduce Fiduciary Litigation Risks for Trustees](#)

First appeared as part of the conference materials for the
17th Annual Changes and Trends Affecting Special Needs Trusts session
"How to Reduce Fiduciary Litigation Risks"